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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 16

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL & DIE MAKERS LODGE NO. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS; AND PRODUCTION LODGE NO. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS, PETITIONERS

v.

NATONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 371–405) is reported at 110 F. (2d) 29. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 324–366) are reported at 8 N. L. R. B. 621.

JURISDICTION

The decree of the court below (R. 405) was entered on November 20, 1939. The petition for a writ of certiorari was filed on February 17, 1940, and was granted on April 1, 1940, 309 U. S. 649 (R. 411). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that the employer assisted the I. A. M. by unfair labor practices prior to entering into a closed-shop contract with it, so as to render the contract invalid under Section 8 (3) of the Act.

2. Whether, in the circumstances of this case, the Board acted within its discretion in finding that a unit comprising the employer's production employees, including those in the toolroom, was appropriate for collective bargaining purposes.

3. Whether, in the circumstances of this case, it was within the discretion of the Board, upon findings that the employer had refused to bargain collectively with the U. A. W., which had been designated by a majority of the employees in an appropriate unit, to require the employer to bargain with that organization, despite a claim, submitted

to the Board by the I. A. M. shortly before the Board issued its order, that the I. A. M. then had been designated by a majority of the employees in the unit.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act,[1] the Board issued its findings of fact, conclusions of law, and order (R. 324–366).

The findings of the Board with respect to the unfair labor practices and the appropriate unit are detailed under Point I of the Argument (*infra,* pp. 42–62). In brief outline, the Board found that the Serrick Corporation, herein called the Company, in violation of Section 8 (2) of the Act, had from December 1936 to September 16, 1937, dominated and interfered with the administration of, and had contributed support to, a labor organization of its employees known as the Acme Welfare Association

[1] These were: a charge and amended charge, filed by the United Automobile Workers of America, Local No. 459, affiliated with the C. I. O., herein called the U. A. W.; complaint; answer; hearing before a trial examiner, at which the International Association of Machinists, affiliated with the A. F. of L., herein called I. A. M., intervened; intermediate report of the trial examiner; and exceptions thereto by the U. A. W.

(R. 334); that thereafter the Company, by assisting the I. A. M. and opposing the U. A. W. and by other acts, had interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8 (1) of the Act (R. 346, 358–360); that the Company's discharge of 18 toolroom employees because of their failure to join the I. A. M. was in violation of Section 8 (3) of the Act, for the reason that the closed-shop contract with the I. A. M., pursuant to which the employees were discharged, was illegal under that section in that (a) it was made with a labor organization "assisted" by unfair labor practices, (b) the labor organization did not represent an uncoerced majority of the toolroom employees, and (c) the toolroom, the unit covered by the contract, was not, in the circumstances of this case, an appropriate unit for collective bargaining purposes (R. 346–347); and that at all times after August 10, 1937, the Company, contrary to Section 8 (5) of the Act, refused to bargain collectively with the U. A. W., although that organization had been designated by a majority of the Company's employees in an appropriate unit (R. 352–358).

Upon the basis of these findings, the order of the Board (R. 362–366) requires the Company to cease and desist (a) from giving effect to its closed-shop contract with the I. A. M., provided, however, that the Company is not precluded from hereafter entering into such a contract with the I. A. M. or any

other labor organization under conditions which satisfy the requirements of Section 8 (3); (b) from refusing to bargain collectively with the U. A. W. as the exclusive representative of its employees in the unit found by the Board to be appropriate; and (c) from its various other unfair labor practices, not here in issue. As affirmative action designed to effectuate the policies of the Act, the Board ordered the Company to reinstate with back pay the toolroom employees discriminatorily discharged and to post appropriate notices.[2]

The Company complied in full with the Board's order (R. 367–370). On September 29, 1938 petitioners herein filed in the court below a petition (R. 1–15) to review and set aside those portions of the order (R. 363) which require the Company to cease and desist from giving effect to its closed-shop con-

[2] Having found, as part of the case arising upon the charges filed under Section 10 (b) of the Act, that the U. A. W. was the accredited representative of the employees in an appropriate unit, it was unnecessary for the Board to act upon the petition which had been filed by the U. A. W. under Section 9 (c) of the Act for certification of representatives. The petition was, therefore, dismissed by the Board (R. 361). Petitioners erroneously characterize, and in some respects treat, the Board's findings and order in the proceeding under Section 10 (b) as a certification of the U. A. W. under Section 9 (c) (Pet. Br., pp. 6, 7, 8, 13, 41, 43, 44). This it clearly is not. Compare *National Labor Relations Board* v. *The Falk Corporation*, 308 U. S. 453; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers et al.*, 308 U. S. 413; *American Federation of Labor et al.* v. *National Labor Relations Board*, 308 U. S. 401.

tract with the I. A. M. and from refusing to bargain collectively with the U. A. W. The Board answered, praying that the petition to review be denied (R. 16–18).

On November 20, 1939, the court below rendered its decision (R. 371–401) affirming the order of the Board, and entered a decree accordingly (R. 405). The effect of the decree is merely to deny the petition to review. The Board did not request enforcement against the Company nor was the Company made a party to the proceedings.

SUMMARY OF ARGUMENT

I

The closed-shop contract between the Company and the I. A. M. is invalid under Section 8 (3) of the Act. That section expressly limits permissible closed-shop contracts to those made between an employer and a labor organization which has not been established, maintained, or assisted by any unfair labor practice and which is the authorized representative of the employees in an appropriate collective-bargaining unit. The Board found that the I. A. M. was assisted by the Company's unfair labor practices, that the I. A. M. did not represent an uncoerced majority of the toolroom employees, and that the toolroom employees, the unit covered by the closed-shop contract, did not constitute an appropriate bargaining unit.

A. Subsidiary findings of the Board which petitioners do not challenge fully support the conclu-

sion that the I. A. M. was assisted by unfair labor practices. The management vigorously campaigned against the U. A. W. and made known that it would recognize the I. A. M. but not the U. A. W. The Company permitted the I. A. M. to use its premises as recruiting headquarters and aided in the membership campaign.

B. Additional assistance was rendered the I. A. M. by the Company through six employees, for whose activities petitioners deny that the Company is responsible under the Act. But the employees in question had been vested by the Company with authority over their fellows; this and other circumstances under which their activities were carried on were such as to lead the other employees reasonably to believe that the six were acting on behalf of the Company. The employer is therefore answerable for what they did. *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38 (C. C. A. 6); *H. J. Heinz Co.* v. *National Labor Relations Board,* 110 F. (2d) 843 (C. C. A. 6); *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.,* decided October 7, 1940 (C. C. A. 4); *National Labor Relations Board* v. *American Manufacturing Co.,* 106 F. (2d) 61 (C. C. A. 2), modified and affirmed, 309 U. S. 629; *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2d) 85 (C. C. A. 5); *Swift & Co.* v. *National Labor Relations Board,* 106 F. (2d) 87 (C. C. A. 10). The mere fact that the six employees were members of the I. A. M. does

not of itself divest the employer of responsibility for their actions. *Virginia Ferry Corp.* v. *National Labor Relations Board,* 101 F. (2d) 103 (C. C. A. 4).

C. The I. A. M. had not, at the time of the execution of the contract, been freely designated as their representative by a majority of the toolroom employees, since its membership was attributable to the Company's unfair labor practices. The I. A. M. therefore lacked authority under the Act to enter into the contract.

D. In any event, the toolroom employees, the unit covered by the closed-shop contract, did not constitute an appropriate bargaining unit. The Board's finding that the appropriate unit consisted of all the production employees, including the toolroom employees, is plainly reasonable in the circumstances of this case. To resolve the conflict between craft and plant units frequently arising in the administration of the Act, the Board has devised the so-called Globe Doctrine, upon which petitioners rely. Under this doctrine the Board has ordinarily given effect to the free desire of a majority of the employees in the less inclusive unit over that of a majority of all the employees. But in order to justify this, the choice by the smaller majority to segregate itself from the others must be a free choice. In the present case there was no free expression of desire by a majority of the toolroom employees for a craft unit. The Globe Doc-

trine, therefore, does not apply, and petitioners' present reliance upon it is unsound. Petitioners also err in asserting that the toolroom employees necessarily, and as a matter of law, constitute an appropriate unit: the most that can be said is that they constitute a group which might have been set aside as a separate unit if a majority of them had freely expressed a desire to that end. Nor may petitioners validly claim that the Board should have held an election to determine whether such a desire was entertained: the issue before the Board was whether the U. A. W. was the authorized representative of the employees in an appropriate unit at the time of the Company's refusal to bargain. An election held at the time the case was before the Board for decision could not resolve that issue.

Further, a majority of the Board found that since the I. A. M. was, like the U. A. W., in reality organizing on a plant-wide basis, it could not maintain that the craft unit was appropriate. This method of organizing by the I. A. M. casts further doubt upon the soundness of the assertion that membership in the I. A. M. reflected a desire by the toolroom employees for a craft unit.

E. Continued compliance with the contract would constitute a continuing violation of Section 8 (3). The Board's order requiring the Company to cease giving effect to the contract is, therefore, plainly valid. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350; *Consolidated*

Edison Co. v. *National Labor Relations Board,* 305 U. S. 197, 236.

II

The order requiring the Company to bargain collectively with the U. A. W. is an appropriate remedy for the refusal to bargain, and the Board properly disregarded petitioners' belated assertion that after the refusal to bargain it had become the majority representative. The Company's unfair labor practices could not operate to change the employees' representative. *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318. The effect of an illegal refusal to bargain is to drive employees away from their chosen representative and to create a continuing obstacle to their free choice. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The only effective means of correcting this result is to require a grant of the withheld recognition. Further, the decisions giving weight to assertions of loss of majority after the refusal to bargain but before such refusal has been remedied (*National Labor Relations Board* v. *National Licorice Co.,* 104 F. (2d) 655 (C. C. A. 2); *National Labor Relations Board* v. *American Manufacturing Co.,* 106 F. (2d) 61 (C. C. A. 2); *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board,* 104 F. (2d) 49 (C. C. A. 8)) prevent effective enforcement of Sec-

tion 8 (5) by necessitating successive inquiries into such claims, which may indefinitely delay the bargaining order. Petitioners' suggestion that in such circumstances the Board should withhold the normal bargaining order and direct an election is impracticable and would convert a proceeding designed to halt and remedy a refusal to bargain into a representation proceeding for the certification of representatives.

It is not true that the bargaining order may saddle upon the employees a representative not wanted by a majority. The U. A. W. had a free majority at the time of the refusal to bargain and of the hearing; at the time the Board's order issued it would have been impossible to determine whether the employees' free choice had changed because freedom of choice had not been restored in the plant. After dissipation of the effects of the unfair labor practices, however, Section 9 of the Act affords a ready means for determination of representatives upon petition by the employees or by any labor organization in their behalf. Petitioners could long since have pursued their remedies under that section. Instead they have chosen to insist that the new question of representation must be determined before the unfair labor practices have been effectively remedied; we submit, on the contrary, that that question must wait until conditions permitting a free choice have been reestablished by remedying the violations of the Act. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548.

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The Board's position concerning the irrelevance of asserted changes of majority alleged to have occurred before the unfair labor practices have been remedied has been approved by the Circuit Courts of Appeals for the First, Fourth, Seventh, Eighth, and Tenth Circuits.

ARGUMENT

I

THE CLOSED-SHOP CONTRACT BETWEEN THE COMPANY AND THE I. A. M. IS INVALID UNDER SECTION 8 (3) OF THE ACT

Section 8 (3) of the Act renders invalid a closed-shop contract—which *ipso facto* requires discrimination upon the basis of union membership—except when the conditions enumerated in the proviso to the section are satisfied. The proviso is as follows:

> *Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.[3]

[3] The Senate Committee on Education and Labor pointed out, concerning this provision: "* * * the bill is ex-

The Board found in the present case that the closed-shop contract executed by the Company with the I. A. M. was invalid because (1) the Company's unfair labor practices assisted the I. A. M. in obtaining its membership among the employees (R. 360; see R. 346); (2) the I. A. M. did not represent an uncoerced majority of the toolroom employees at the time the contract was executed (R. 346); and (3) the toolroom employees, the unit covered by the contract, did not constitute an appropriate bargaining unit (R. 346–347).

A

THE BOARD'S FINDINGS THAT THE EMPLOYER ASSISTED THE I. A. M. BY UNFAIR LABOR PRACTICES ARE SUSTAINED BY SUBSIDIARY FINDINGS NOT CHALLENGED BY PETITIONERS

Petitioners have stipulated to the correctness of all the Board's findings except those relating to the supervisory status of four named toolroom employees active in the I. A. M. campaign during the period immediately preceding the execution of the toolroom contract [4] and those relating to the appro-

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tremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice" (Senate Report No. 573, 74th Cong., 1st Sess., p. 12).

[4] The Board found that these four employees, Fouts, Shock, Bolander, and Dininger were supervisory employees (R. 338–341). Two other employees active in the I. A. M. campaign, Byroad and Baker, were not found to have such

priateness of a unit embracing both toolroom and production employees (R. 406–408). The findings to which petitioners have stipulated fully support the Board's order. Petitioners' attack upon the supervisory status of the toolroom employees and the appropriateness of the bargaining unit reaches only a small segment of the pertinent findings; as the court below said (R. 379): "The toolroom episode was merely one phase of a plant-wide controversy lasting from May to October" and the events in the toolroom were but "integral parts" of "the general contemporaneous current." A chronological statement of the facts will demonstrate that the Board's order is fully supported, without regard to the validity of petitioner's limited challenge.[5]

The Acme Welfare Association, an "inside" employees' labor organization established in 1934 by the Company's predecessor, was maintained by the Company in its plant until the U. A. W. began or-

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status, but the court below held the Company responsible for their coercive and interfering activities on the ground that they acted on behalf of the Company (R. 389, 392–395).

[5] While the stipulation excepts the supervisory status of the six toolroom employees, the findings of the Board and the statements of the court below concerning the conduct of these employees and their relationship to the Company are otherwise agreed to be supported by the evidence (R. 407). The Company's responsibility for the activities of these employees is discussed at pages 26–41, *infra*.

ganizing in May 1937 (R. 331–332, 375–376).[6] The Company's personnel director, Lewis, was president of the Association and directed a vigorous campaign to enlist all employees in it and to keep them out of the U. A. W. (R. 331–332, 376, 381–382). Company executives, including Murphy, vice president and general manager, Poole, works manager, Stillwagon, plant superintendent, and Lewis, intervened publicly at meetings of the Acme Welfare Association and privately, urging employees into the Association and warning, threatening, and discharging them for leading or even joining the U. A. W. (R. 332–333, 336–382). Lewis advised the governing committee of the Association that the U. A. W. meetings were under surveillance by the Company (R. 336, 386, 392). Five U. A. W. officials, including its president and vice president, were discharged by the Company during the week of June 17 to 25, 1937, because of their union activities (R. 336–337, 347–348, 382).

Particular emphasis in this campaign was placed upon the toolroom (R. 333, 338, 382). Lewis assigned to Sharpe, Association committeeman for the toolroom, the task of persuading the employees there to join the Association (R. 333, 338, 382); in

[6] In view of the stipulation as to the correctness of the findings made by the Board and the court below, the printed record does not in most instances contain the evidence which supports these findings. Therefore citations here made are to the findings of the Board and the opinion of the court below, except where the supporting evidence has been printed.

this effort Sharpe was abetted by McCoy, the toolroom foreman (R. 29–31, 338, 390). *Fouts, Shock, Byroad,* and *Bolander*[7] engaged in widespread solicitation in the toolroom on behalf of the Association during working hours, either calling the employees to the foreman's desk to sign membership cards or approaching them at their benches (R. 22, 30–31, 35, 36, 43–44, 51, 54–55, 333, 340).

However, despite the Company's efforts to build it into an effective instrument to block the U. A. W., the Association failed to obtain acceptance by the employees (R. 338). With the decline of the Association by mid-July, the word went around that the management would not recognize the U. A. W. as the employees' representative and that it favored the I. A. M. (R. 338). General Manager Murphy told *Shock* that he would close the plant before he would deal with the U. A. W. (R. 338–339). Superintendent Shimer and *Shock* each reported to the toolroom employees that the Company would not recognize the C. I. O. but would recognize an A. F. of L. union (R. 31, 34, 42, 90–91, 338–339, 387, 388).

On July 26, the same day on which Shimer made these assertions, he further stated that "the foremen don't like the C. I. O.," that there was "going to be quite a lay-off" and that C. I. O. members would be the first to go (R. 41, 388). These pre-

[7] For the convenience of the Court, the names of the six employees for whose conduct petitioners contend the employer is not responsible are italicized in the immediately succeeding pages.

dictions were subsequently borne out (R. 388–389). *Fouts, Shock,* and *Bolander,* who had been extremely active on behalf of the Association (*supra,* p. 16), took the initiative in introducing the I. A. M. into the plant. Under the direction of *Fouts* and *Shock, Byroad* conducted a "straw vote" among the employees during working hours (R. 339, 383, 392). Although *Byroad* did not question all three shifts, it was announced that 80 percent of the employees favored the A. F. of L. (R. 339, 383, 392). Again acting at the direction of *Fouts* and *Shock, Byroad,* during working hours, left the plant and sought out an I. A. M. organizer (R. 122, 340, 392). *Fouts* advised toolroom employees that "he had attempted to contact and did contact an A. F. of L. organizer who would come from Indianapolis and would help them organize a local in Muncie" (R. 23, 340). On the night of July 28, the I. A. M. organizer held an organization meeting; 34 of the 63 toolroom employees signed I. A. M. application cards (R. 340). Included among the 34 were *Fouts, Shock, Bolander, Dininger, Byroad,* and *Baker* (R. 173–174, 383).

From July 26 to August 10 a vigorous organizational campaign was conducted on behalf of the I. A. M. (R. 340, 389–394). *Fouts* solicited workman after workman in the toolroom to join that union, stating that the purpose was to "abolish the C. I. O. organization in the shop," to "beat" the U. A. W. (R. 22–23, 31, 36, 45, 340, 390–391). Stev-

enson, a toolroom employee who had been solicited shortly theretofore by *Fouts* "to get into the company union just to beat the C. I. O." was again solicited by *Fouts,* this time "to join the A. F. of L. for the same reason, just to beat the C. I. O." (R. 52, 340–341, 390). *Fouts* also told Stevenson that if he joined the I. A. M. but "did not want to stay, that would be all right, just as long as they got in enough to beat them [U. A. W.] out" (R. 54, 341). *Fouts* threatened one employee with discharge if he did not join the I. A. M. (R. 45, 340, 390).

Shock engaged in similar activity on behalf of the I. A. M. (R. 45, 340, 383, 390). Indeed, for a week preceding the Company's execution of the closed-shop contract with the I. A. M. on August 11 "practically all" that *Shock* did "was go from one bench to another soliciting" (R. 57, 392). *Dininger* offered one employee a higher efficiency rating if he would join the I. A. M. (R. 42, 341, 393). During the latter part of July or the first week in August, *Bolander* permitted, in his presence and during working hours, the use of his desk by an I. A. M. committeeman for the purpose of having I. A. M. application cards signed by the employees (R. 53, 341, 393).

The Company's higher officials knew of, and participated in, these activities. On August 6, Personnel Director Lewis advised two of the toolroom employees, while they were at work, to "join the A. F. of L." in order "to have one organization

in the toolroom" (R. 25, 28–29, 33, 341, 381). When, following the execution of the closed-shop contract, one of the toolmen pointed out to Personnel Director Lewis that "a lot of pressure" had been put on the men and that their jobs had been "threatened," Lewis, far from denying the accusation, replied the toolmen had acted "like a bunch of schoolboys" (R. 25). McCoy, foreman in charge of the toolroom, was present during open solicitation by various employees and admittedly knew what was going on (R. 19–20, 22–23, 46, 53, 341–342, 390). *Byroad* spent 75 or 80 percent of his time soliciting for the I. A. M. in the toolroom during working hours (R. 19–20, 26, 35, 55); his activities included threats of loss of employment for those who did not sign up (R. 21), cursing employees who did not do so (R. 47–48), and telling others "Mac [McCoy] knows what I am doing. Mac is an old A. F. L. man himself. He wants us to get in the A. F. L., but don't want us to have anything to do with the C. I. O." (R. 33, 92, 392). *Baker* likewise repeatedly solicited in the toolroom during working hours (R. 24, 26, 31, 34). In contrast to the freedom allowed I. A. M. activities on company time and property was the sharp order given by Plant Manager Westlund to several employees belonging to the U. A. W. to "check out their time" when they tarried in returning from a conference with the management about the U. A. W. (R. 77–78, 117; see also R. 26).

At conferences with the management on August 3, the I. A. M. presented a contract covering the toolroom employees and containing, among others, a closed-shop provision; *Shock,* as spokesman for the I. A. M., advised General Manager Murphy that the purpose of the contract was to "keep the C. I. O. out of the toolroom" and that "after the trouble was settled" the Company "could tear up the contract" (R. 343-344, 383). The contract was executed on August 11 but was dated back to August 6 (R. 345). As of the date of execution, 35 of the 63 toolmen were members of the I. A. M., 19 of the U. A. W., and 2 had signed cards in both organizations (R. 173–175). On August 13 all toolroom employees who declined to apply for I. A. M. membership, more than 20 in number, were discharged (R. 173–175, 345, 384).

On August 10 and thereafter, the Company refused to bargain with the U. A. W. although that organization had been designated by a majority of the production and toolroom employees (R. 352–358, 384–385). The Company distributed to the employees a circular taking note of a feeling of dissatisfaction and unrest, attributing this to "outsiders," hinting that the plant might be closed, urging the employees not to be fooled by the "promises" of "strangers," and declaring the Company's intention not to deal with "irresponsible organizations" (R. 353–354, 384). Simultaneously, the I. A. M. began a campaign, assisted

by the Company's staff, to organize the production employees (R. 157, 389–390). The weapon of discriminatory discharge was used (R. 349).

This statement, in broad outline, of the occurrences in the Company's plant, indicates the extent of employer aid to the I. A. M. through interference, intimidation, coercion, and discriminatory discharges, both in the toolroom and throughout the plant. As the court below stated, the Company evinced a "determined purpose, never relaxed, to have nothing to do with the U. A. W. and to use the I. A. M. to keep U. A. W. out of the toolroom and the plant" (R. 386).

The Board's determination that the closed-shop contract between the Company and the I. A. M. was invalid under Section 8 (3), is thus supported by many unchallenged subsidiary findings of assistance to the I. A. M. prior to execution of the contract, irrespective of the validity of petitioner's claim that the six toolroom employees were not "supervisors." Coercive statements, employer promotion of a company union, and discriminatory discharges, made it abundantly clear, before the I. A. M.'s appearance on the scene, that the employees were not free to select the U. A. W. as their bargaining representative. While thus discouraging U. A. W. activity, the Company advanced the cause of the I. A. M. by making known, prior to affiliation of any of the employees with the I. A. M., that the Company would recognize the A. F. of L.

but not the C. I. O. The Company's premises were turned over to the I. A. M. for use as a recruiting headquarters; the personnel director "advised" employees to join the I. A. M.; and the organization which the Company foisted upon the employees was ultimately recognized, while recognition was refused the U. A. W.

Petitioners urge that unfair labor practices against the U. A. W. do not constitute "assistance" to the I. A. M. (Br. pp. 22–25). The evidence we have reviewed shows much more than anti-U. A. W. interference. Even such interference, however, is relevant and important; as the court below repeatedly stated (R. 379, 380, 396), the various unfair labor practices cannot be viewed in isolation from the whole course of events at the plant during the months immediately preceding the execution of the closed-shop contract. The measures taken in opposition to the U. A. W. were coupled, prior to the contract, with the statement by Superintendent Shimer that the company would recognize the A. F. of L., Personnel Director Lewis' "advice" to join the A. F. of L., and the unlimited freedom accorded to I. A. M. organizers in using company time and property. In combination, substantial "assistance" is plainly shown. Intense opposition to one organization, including the discharge of its leaders, enables an employer to herd employees into a favored rival union; fear of discharge unless the employer is satisfied that they are in the "right"

camp plainly leads employees to align themselves with the favored group.

Here the Company's employees had been desirous of obtaining the advantages of collective bargaining and organization. Their first efforts in this direction were met by a vigorous campaign to discourage membership in the U. A. W. and to force acceptance of the company-dominated Association. When the Company's campaign on behalf of the Association failed to destroy the U. A. W., the leaders of the latter organization were discharged. Admittedly, the Company repeatedly informed the employees that it would not recognize or deal with the C. I. O. and, prior to any employee's affiliation with the I. A. M., made it forcefully manifest that it was the I. A. M. or no representation for collective bargaining. Under these circumstances the evidence fully warrants the Board's finding that the Company "coerced and induced its toolroom employees to establish the I. A. M. local by clear indications of uncompromising hostility to the U. A. W. and friendliness for the I. A. M., by assisting in the enlistment of the I. A. M. membership, and by concluding a closed-shop contract with that organization when the U. A. W. had requested an exclusive bargaining contract covering all the production employees in the plant, including toolroom employees" (R. 346), as well as the further findings that the I. A. M. was

assisted by the Company and did not represent an uncoerced majority of the toolroom employees (R. 346–347).[8]

Petitioners contend further that there were no subsequent unfair labor practices which enabled the I. A. M. to *retain* its majority, that there is no evidence to support such an inference, and that the Board made no such finding (Br. p. 25). The Board found that "inasmuch as the membership of the I. A. M. must be deemed vitiated by the interference of the [Company] in the solicitation of such membership, the I. A. M. did not represent an uncoerced majority of the toolroom employees at the time of the execution of the closed-shop contract" (R. 346). This finding is ample. When extensive and intense unfair labor practices are

[8] Petitioners' assertion that "there is no finding by the Board that there were any unfair practices of any kind on the part of the employer assisting the I. A. M. prior to the time the I. A. M. had obtained a majority membership on July 28, 1937" (Pet. Br., p. 25), is inaccurate. As the above quotation from the Board's findings indicates, the Board determined that the Company "coerced and induced its toolroom employees to establish the I. A. M. local" (R. 346). The unfair practices occurred in large measure prior to July 28—the attempt to foist the Association on the employees; the discharges of U. A. W. leaders; the announcements that the Company would not recognize the U. A. W. but would recognize the A. F. of L.; Superintendent Shimer's representations to employees of the toolroom on July 26 that C. I. O. men would be laid off and that the Company would never accept the C. I. O. but would willingly deal with the A. F. of L.—had all occurred before any employee of the Company joined the A. F. of L.

found, it is a fair inference from the findings that both the acquisition of a majority by the assisted union and the retention thereof resulted from the unfair labor practices. The finding that on August 11 the I. A. M. did not represent an uncoerced majority is an accurate summary of the effects of the unfair labor practices.

The employer conduct found in this case differs in no significant respect from that in other cases where findings that employee freedom of choice was destroyed have been approved by the courts.[9] Petitioners' challenge to the efficacy of such unfair labor practices to deny freedom of choice goes to the very basis of the Act. What petitioners really request is an exception, in their case, to the usual inference: they have conceded that the Company's activities on behalf of the Association—differing neither in kind nor degree from the Company's subsequent activity on behalf of the I. A. M.—precluded freedom of choice (R. 407, 332–334, 361). The distinction appears to rest entirely upon the nature of the organization favored by the employer. The Act recognizes no such dis-

[9] *E. g., National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 250, 262; *National Labor Relations Board* v. *Bradford Dyeing Association (U. S. A.)*, 310 U. S. 318; *National Labor Relations Board* v. *The Falk Corporation*, 308 U. S. 453; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8); *National Motor Bearing Co.* v. *National Labor Relations Board*, 105 F. (2d) 652 (C. C. A. 9); *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87 (C. C. A. 10).

tinction. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197. As the Board found, and the court below agreed (R. 346, 394, 399–400), the coercion and interference which made up the Company's assistance to the I. A. M. prevented that organization's designation by the employees from constituting the free designation which the Act requires.

B

THE COMPANY WAS PROPERLY HELD RESPONSIBLE FOR THE ACTIVITIES OF THE SIX EMPLOYEES WHOSE "SUPERVISORY" STATUS IS CHALLENGED BY PETITIONERS

In addition to those acts of assistance, described above, for which petitioners concede that the Company was responsible, the activities of Fouts, Shock, Bolander, Dininger, Byroad, and Baker further support the Board's findings of employer assistance to the I. A. M. As we have stated (note 4, pp. 13–14, *supra*), the Board found that the Company was answerable for the conduct engaged in by the four first named above, and the court below held that, in assisting the I. A. M., Byroad and Baker likewise acted on behalf of the Company. In demonstrating the correctness of these holdings, we shall first briefly review the authority of the employees in question and shall then discuss the principles which, we believe, should control determination of employer responsibility under the Act for activities of employees.

Fouts, Shock, Bolander, and Dininger each directed groups of machinists in their work (R. 23,

40, 43, 44). Fouts was in charge of the "roll department," had authority to determine whether or not the men under him were suitable for a particular job, and was regarded by the employees under him as a "boss" or "assistant foreman" (R. 23–24, 30, 44, 54). Shock was in charge of the entire toolroom during the absence of Foreman McCoy during the day shift (R. 34, 44, 45). It was Shock who instructed Byroad to inform the employees during working hours of the execution of the closed-shop contract with the I. A. M. (R. 126). Dininger and Bolander were referred to in the testimony as "foremen" (R. 40, 42, 43), and McCoy testified that they were in charge of the second and third shifts, respectively, which worked at night; McCoy worked only during the day (R. 114–115). According to McCoy, Dininger had the power to "lay off" men, though apparently not to discharge them (R. 111). Personnel Director Lewis testified that Dininger and Bolander had the power to recommend employees for hire and discharge (R. 77). As the court below pointed out, "McCoy himself had little, if any, further power. According to all the evidence, 'hiring and firing' was the function primarily of Lewis, more rarely of his superiors. A suggestion for employment or discharge by foremen and subforemen so closely connected with management is as potent, practically, as the power to 'hire and fire' " (R. 395).

We do not think that the question may be accurately phrased, as petitioners phrase it, in terms of whether Fouts, Shock, Bolander, and Dininger

were "supervisory" employees (Br. 14, *et seq.*). Whether an employer is answerable for acts of coercion and interference by his employees should not be determined by whether the employees may be labelled as "supervisory."[10] The proper test of employer responsibility is whether the employer has fulfilled his affirmative obligation to prevent use of his economic power over the employees in such manner as to interfere with their free exercise of the rights guaranteed by the Act. The controlling consideration is not any moral culpability on the part of the "employer"—or, in modern industry, on the part of any executive cog in an impersonal corporate setup—but the fact that the employees have been subjected to compulsions based upon the employer's economic power. The

[10] For this reason we do not, as does petitioner (Br. 18–19), regard the stipulation (R. 169–177) entered into at the hearing setting forth the names of all employees except "supervisory employees" and certain others, and containing the names of Fouts, Shock, Bolander, and Dininger, as determinative upon the question whether the company is answerable for the activities of these four. The stipulation shows on its face that its purpose was to list the employees according to their classification by the company on its pay roll (R. 169). The stipulation did not preclude the Board from proving at the hearing, in accordance with the principles for which we contend (*infra*, pp. 28–41), that the authority of certain of the employees enumerated in the stipulation and the circumstances under which they acted were such as to make the company responsible for their acts of interference and coercion. The interpretation which petitioner now seeks to place upon the stipulation was strongly urged in the court below; the court held that the four employees here in question "had actual, though not officially, nominal, supervisory capacity" (R. 394).

Board's obligation and function under the Act is to free employees in the future from the restraints which destroy freedom of self-organization; the concept of moral culpability on the part of the employer, which underlies any test based upon the presence or absence of express or implied "authorization," cannot limit exercise of the Board's power and duty to remove restraints which have been in fact imposed. See pages 34–35, *infra*.

Plainly, the fact that the actor has been vested by the employer with authority over other employees is a significant circumstance in determining whether the employees could reasonably regard his actions as those of the employer. The Act proscribes interference by employers because their "suggestions" and "advice" are backed by economic control over the employee's livelihood. By selecting an employee from among his fellows and vesting him with *indicia* of authority over them, the employer, in greater or less degree according to the authority conferred, lends his own prestige to the employee's actions in the eyes of the employees as a whole and strongly suggests that his power stands behind the employee's actions. The authority to hire or discharge, or to recommend such action, serves as an unequivocal hallmark of management representation, since it constitutes an actual investiture of capacity to exercise, or to bring about an exercise of, the employer's power in its most extreme form. Other powers are less plainly insignia of managerial status; but alone, or in combination, they may create the rea-

sonable impression which is the source of the employer's responsibility.

In modern industry the employer necessarily vests in a number of employees the power to direct and regulate the work of their fellows, that is, to give orders which are binding under plant discipline. Authorities in the fields of labor relations and economics are agreed that, to the employee, who rarely, if ever, comes into contact with higher officials in a large plant, his immediate "boss"—whether he be called "foreman," "supervisor," "straw boss," or "group leader"—represents the management's views and is the means whereby employee opinion can be molded in accordance with those views. "He is the interpreter of the management to the men as well as being the director of production itself." [11] As the means through which tangible contact is made, he "*is* the company." [12]

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[11] Metropolitan Life Insurance Co., Policyholders' Service Bureau, *Foreman Training Plans* (1929), p. 5. See also Scott, Clothier, and Mathewson, *Personnel Management: Principles, Practices, and Points of View* (1931), pp. 43–44:

"The reason the foreman is the key man is this: regardless of what the administrative policies of the company may be, regardless of the extent to which the foreman properly interprets those policies, the man on the job looks up to him as the *management*. In the mind of the worker, management is fair or unfair in the degree in which his foreman is fair or unfair; intelligent or stupid as the foreman himself is intelligent or stupid; helpful and friendly as the foreman himself is helpful and friendly. The foreman has it in his power thus to modify the company's attitude toward its workers and, consequently, to formulate the workers' attitude toward the company."

[12] Tead and Metcalf, *Personnel Administration: Its Principles and Practice* (3rd ed., 1933), p. 151. See also Ander-

Employe-employer relations at the strawboss and foreman level must be watched carefully by management, for at that level human relations are almost inseparable from the job. It is through the immediate superior at that level that contact is established between the workman and management. It is at that point of contact that actual experiences and impressions occur. It is necessary therefore to train executives of this first outpost of management in the fundamentals of good industrial relations policies and practices, for they occupy the diplomatic post of management and, as such, are the moulders of worker opinion.[13]

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son, *Industrial Engineering and Factory Management* (1928), p. 39: "At the furthest outpost of management, he *is* management to the workers."

[13] McMurry, *So You Handle People*, in *The Society for Advancement of Management Journal* (Nov. 1937), p. 168. See also Watkins and Dodd, *The Management of Labor Relations* (1938), pp. 436–437:

"The workers look upon him as the official representative of the company, and frequently he is the only representative with whom they ever come in touch. It is natural, therefore, that his words, actions, attitude, and methods should be accepted and interpreted by them as reflecting the established policies and practices of the firm. This may or may not be the case, but the fact that the workers believe it to be so is sufficient to cause misunderstanding."

In Reitell, *How to be a Good Foreman* (1927), p. 5, it is said of this type of employee: "* * * they are right up in the firing line, carrying to every worker the spirit and the underlying policy of the concern." Concerning the tendency of ordinary employees to follow an immediate leader's example, see Allen, *The Foreman and His Job* (1922), pp. 7–8.

By reason of this strategic location, the employee vested with authority can with facility exercise the employer's directive and disciplinary power so as to give sanction to the policies and desires which he voices. Petty discriminations, each too slight to admit of successful appeal, may readily visit serious discomfort upon opponents.[14] Consequently, the employees tend to "pattern their ideas after his, either because they respect him as a leader or because they wish to keep in his good graces."[15] The ultimate responsibility is the employer's; he has clothed the "supervisor" with power to inflict hardship and has therefore lent to his hints and suggestions an implied threat of oppression.[16]

The Circuit Courts of Appeals have repeatedly held that under the Act an employer may be held responsible for the activities of employees in whom he has vested authority over others, regardless of

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[14] Slichter, *The Turnover of Factory Labor* (1919), p. 390. The worker in modern industrial society has been said to live under "the many fears incidental to tyrannical and capricious behavior on the part of those in authority, and especially of subordinate officials toward workers under their direction * * *." W. L. MacKenzie King, *Industry and Humanity* (1935), pp. 129–130. "* * * he is always somewhat at the mercy of a more or less whimsical supervisor." Hepner, *Human Relations in Changing Industry* (1934), p. 124.

[15] National Metal Trades Ass'n, Committee on Industrial Education, *Foremanship; Presenting the Fundamental Principles of Practical Foremanship* (1928), pp. 3–4.

[16] Compare U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 634, *Characteristics of Company Unions* (Govt. Print. Off., 1935), pp. 8–9.

whether he has "authorized" those activities.[17] In opinions expressing the *ratio decidendi* of such holdings the controlling consideration has been whether the actor's authority and responsibilities, or other circumstances surrounding his actions, were such as might induce a reasonable belief on the part of the employees that he spoke for the employer. In *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38, the Circuit Court of Appeals for the Sixth Circuit said (at p. 44):

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[17] *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 64, 67 (C. C. A. 2); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 721–722 (C. C. A. 3); *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951, 956 (C. C. A. 4); *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. (2d) 103, 106 (C. C. A. 4); *National Labor Relations Board* v. *Planters Mfg. Co.*, 105 F. (2d) 750, 754 (C. C. A. 4); *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867 (C. C. A. 5); *National Labor Relations Board* v. *Lane Cotton Mills*, 111 F. (2d) 814, 816 (C. C. A. 5); *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. (2d) 843, 847 (C. C. A. 6); *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6); *National Labor Relations Board* v. *Colten et al.*, 105 F. (2d) 179, 181 (C. C. A. 6); *National Labor Relations Board* v. *Ford Motor Co.*, decided October 8, 1940 (C. C. A. 6); *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, decided July 25, 1940 (C. C. A. 8); *National Labor Relations Board* v. *Christian Board of Publication*, decided July 25, 1940 (C. C. A. 8); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786, 792 (C. C. A. 9); *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 93 (C. C. A. 10). But *cf. Ballston-Stillwater Knitting Co.* v. *National Labor*

The contention that the several anti-union acts of Markle, and other supervisors, amounting to intimidation, were not authorized and were beyond the scope of authority entrusted to these men, must be rejected, not necessarily upon a strict application of the doctrine of *respondeat superior* as it has been applied in private controversies arising out of tort or contract. It has repeatedly been noted that the National Labor Relations Act contemplates the protection of the public rights which it creates and defines, and that its power to command affirmative action is remedial and not punitive. * * *

It would seem to us, in view of the public rights involved and the remedial nature of the proceeding designed for their preservation and protection, that acts of coercion and intimidation by supervisory employees may be restrained and their resumption interdicted by appropriate action of the Board, even in the absence of clear demonstration of prior authorization or subsequent ratification, at least where the circumstances are such as to induce in subordinate employees a reasonable apprehension that the acts condemned reflect the policy of the

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Relations Board, 98 F. (2d) 758, 762 (C. C. A. 2); *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872, 875 (C. C. A. 3); *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. (2d) 506, 511 (C. C. A. 7), certiorari granted, October 14, 1940, Nos. 235, 236, this Term; *Cupples Co., Mfrs.*, v. *National Labor Relations Board*, 106 F. (2d) 100, 115 (C. C. A. 8); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340, 351 (C. C. A. 8).

> employer. The right freely to organize without coercion or intimidation, is an empty one unless there is authority under the statutory scheme to safeguard it, and the necessity for doing so calls for more appropriate action by the employer than mere declarations of neutrality and impartiality, even though in good faith proclaimed. Further than that we need not go for purposes of present decision.

In *H. J. Heinz Co.* v. *National Labor Relations Board*, 110 F. (2d) 843 (C. C. A. 6, pending argument, No. 73, this Term), the same court noted that the company, although its supervisory staff was engaging in widespread activity against the "outside" union and in favor of the "inside" organization, took no steps to disclaim their activity or to proclaim to the employees the management's neutrality. The court concluded that (at p. 847):

> There was abundant evidence that the ordinary employees feared the disfavor of those from whom they were accustomed to taking orders. Since they were justified in believing that these supervisory employees were acting as petitioner's representatives, petitioner is responsible for what they did.

In *National Labor Relations Board* v. *Mathieson Alkali Works, Inc., decided* October 7, 1940 (C. C. A. 4), the court stated the controlling principles as follows:

> Even if the supervisory position of the employee is of minor character, the employer may be held responsible for his conduct if

> the surrounding circumstances are such as reasonably to justify the inference that it is an expression of the employer's policy or is approved by the employer.

Similarly, in *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2), modified and affirmed, 309 U. S. 629, the court held that the controlling facts bearing upon employer responsibility were that the employees involved "transmitted * * * orders to the men" and that, while they did not in fact have the power to discharge, "the men believed they had it and regarded them as foremen" (106 F. (2d), at 64). And in *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. (2d) 85 (C. C. A. 5), the court emphasized that an employee vested by the employer with authority over the other employees "appeared to be speaking in the exercise of his authority," even though in fact acting in violation of unpublicized instructions (113 F. (2d), at 92).[18] The Circuit Court of Appeals for the Tenth Circuit has agreed that instructions issued

[18] In *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, the Circuit Court of Appeals for the Fifth Circuit stated that the circumstances surrounding the "supervisor's" utterances would warrant a finding of employer coercion if they disclosed "some encouragement or ratification or such repetition as to justify the inference of a policy which they express" (111 F. (2d), at 479). The court went on to indicate that it would not restrict application of the "apparent authority" rule to those having certain types of authority, such as the power to hire and discharge. It suggested that "the management might very well issue

to "supervisors" but not made known to the employees cannot obviate employer responsibility if the instructions are not effective to prevent misuse of the employer's power; the employer is obligated to take "effective means to stop repeated violations of the Act." *Swift & Co.* v. *National Labor Relations Board,* 106 F. (2d) 87, 93 (C. C. A. 10).[19] See also *National Labor Relations Board* v. *Ford Motor Company,* decided October 8, 1940 (C. C. A. 6), where employer responsibility for antiunion violence by employees was based, in part, upon the fact that an official of the Company, who was in charge of the employees in question, expected the union's distribution of literature to be violently resisted, but "would take no action to prevent it, indulging the belief that if it occurred it would not be the fault of the Ford Motor Company."

In the present case, we submit, the authority of Fouts, Shock, Bolander, and Dininger, together

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orders to all having any authority over other employees, that they shall say or do nothing respecting union affiliations" (*ibid.*). In *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867 (C. C. A. 5), the court held that where the employer has itself taken a position hostile to "outside" unions, it must assume responsibility for aid to an "inside" organization by "officers or employees, not officers, but having the confidence of the management, and acting for it * * *" (108 F. (2d), at 871).

[19] The employer's duty to take affirmative action to prevent the employees from being misled concerning the management's position was emphasized in *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. (2d) 340 (C. C. A. 8), where the employer, while abandoning a plainly company-dominated Employees Representation Plan, failed

with the other circumstances surrounding their conduct, warranted the toolroom employees in believing that they spoke and acted on behalf of the management in conducting their extensive campaign to establish the I. A. M. in the toolroom and to keep the U. A. W. out. Their threats of discharge and their promises of a better efficiency rating (*supra,* p. 18) implied the exercise of the company's economic power, not their own. They purported to represent the management, impressing upon the employees the fact that the management would prefer men who joined the I. A. M. (R. 31, 34, 42, 90–91, 338–339, 391, 393); these representations and the inference that their vigorous campaign was undertaken upon orders from higher up, were the more certain of acceptance in view of the discriminatory discharges of U. A. W. members, and of the activities of Personnel Direc-

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to announce to the employees "that the Plan was defunct" (111 F. (2d), at 346–347). The court stated that "it is not the motive influencing this company stand but the effect of such inaction upon the employees which is important in this situation." In *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 112 F. (2d) 657 (C. C. A. 2), pending on petition for certiorari, the court held that, in view of the employees' probable understanding that a new "inside" organization was the successor of the old and enjoyed the favor accorded the old by the company, the fact that the company "had done nothing to mark the separation between the two" constituted the source of its responsibility (112 F. (2d) at 660–661). The same ground of decision was adopted in *Western Union Telegraph Co.* v. *National Labor Relations Board*, decided August 9, 1940 (C. C. A. 2).

tor Lewis, Superintendent Shimer, and Foreman McCoy (*supra,* pp. 16, 18–19), all making plain to the employees that the Company was determined to have the I. A. M., if it had to have any "outside" organization in the toolroom. These circumstances likewise establish that the Company must assume responsibility for the activities of Byroad and Baker, who worked in association with and pursuant to the direction of Fouts and Shock in carrying the Company's message to the employees (*supra,* pp. 17, 19). What they did, therefore, is "imputable to the company," as the court below held (R. 394, 389).

Petitioners contend that the circumstance that Fouts, Shock, Bolander, and Dininger were members of the I. A. M. precludes any inference that their activities were on behalf of the Company (Br., 20–21). Their activities, of course, predated their I. A. M. membership, but the short answer is that the example set by higher officials of the Company and the Company's ~~claim~~ plan preference for the I. A. M. "were enough to justify the inference that the subordinates' acts were more than spontaneous efforts of members to strengthen their own union." *Western Union Telegraph Co.* v. *National Labor Relations Board,* decided August 9, 1940 (C. C. A. 2). Realistically, the employees could not have believed that the very men who had openly espoused the Company's interests in the earlier drive to destroy the U. A. W. by promoting the Association, were now motivated, not by the Company's

desires, but by their own wish to exercise the right of self-organization (*cf.* R. 394). Indeed, statements by the employees in question that the sole purpose of establishing the I. A. M. was to "beat the C. I. O.," that the employees would be free to withdraw from the I. A. M. once this objective was attained, and that the Company "could tear up the contract" once "the trouble was settled" (*supra*, pp. 17–18, 20) conclusively rebut petitioners' argument that Fouts, Shock, Bolander, and Dininger were merely advancing the interests of their own union and that this was obvious to the employees.

The Board found that (R. 341) "Although a union may admit minor supervisory employees to its ranks, yet when, pursuant to the known desires of the employer, they engage in activities to establish a labor organization favored by the employer, they must be regarded as acting in behalf of the employer." In challenging the correctness of this finding, petitioners necessarily contend that coercive conduct may be legalized simply by enrollment of the supervisory staff in the union favored by the employer. The Act protects the supervisor's exercise of his right of self-organization as an employee; but it also protects the other employees from his exercise of the prestige and economic power of the employer in behalf of a particular labor organization. Eligibility for membership in the I. A. M. is no concern of the Board. But in

determining whether the actions of employees in positions of authority reasonably appeared to be taken by them as management representatives, the Board is not required to give conclusive weight to their affiliation with a particular union. That is but one factor affecting the impression made by their activities; here, we submit, that factor was plainly outweighed by the other circumstances indicating that they spoke for the management.[20]

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[20] In *National Labor Relations Board* v. *Christian Board of Publication*, decided July 25, 1940 (C. C. A. 8), the court stated:

"The respondent must be held responsible for the acts of its supervisory employees even though those employees may be included in an appropriate unit for collective bargaining. If it were otherwise an employer could freely influence his employees' freedom of choice by this means yet claim immunity. As between respondent and its foremen the doctrine of respondeat superior applies and the responsibilities of that relationship are not suspended merely because the foremen chance to be included within the appropriate unit for collective bargaining."

A contention identical in all respects with petitioners' reliance upon these employees' membership in the I. A. M. was advanced, and rejected without discussion, in *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4). In *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9), the employer contested a finding that it was answerable for the activities of a supervisory employee in opposition to organizational activities of the Newspaper Guild, upon the ground that he was eligible for membership in the Guild and had been solicited to join it. The court, without specific mention of this contention, held that the Board's findings concerning the unfair labor practices were supported by substantial evidence (102 F. (2d), at 662).

C

AT THE TIME OF THE EXECUTION OF THE CLOSED-SHOP CONTRACT, THE I. A. M. WAS NOT THE FREELY DESIGNATED REPRESENTATIVE OF A MAJORITY OF THE TOOLROOM EMPLOYEES

The proviso to Section 8 (3) requires, as a prerequisite to validity of a closed-shop contract, that the labor organization entering into such a contract be "the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." Apart from the question whether the toolroom employees constituted an appropriate unit (*infra,* pp. 43–59), the contract cannot stand because the I. A. M. was not the freely designated majority representative of the toolroom employees which Section 9 (a) envisages. The Act recognizes only majority representations which are freely obtained; coerced majorities plainly cannot vest in purported representatives the exclusive representation provided in Section 9 (a). The Board found that the I. A. M.'s membership was attributable to the Company's unfair labor practices and that that organization did not represent an uncoerced majority of the toolroom employees at the time the contract was executed (R. 346–347). These findings, supported by the subsidiary findings already discussed, furnish a further ground upon which the closed-shop contract is plainly invalid.

D

THE BARGAINING UNIT COVERED BY THE CLOSED-SHOP CONTRACT WAS NOT AN APPROPRIATE UNIT

Finally, in order for the contract to be valid under Section 8 (3), the toolroom employees, the unit "covered by such agreement when made," must have constituted an appropriate bargaining unit. Section 9 (b) vests in the Board the power to determine, under the circumstances of each case, what the appropriate unit is.[21] In the present case, a determination of the appropriate unit by the Board was necessary not only in passing upon the validity of the I. A. M. contract but also in ascertaining whether or not the Company violated Section 8 (5) in refusing the U. A. W.'s request for bargaining as the exclusive representative of all the production employees, including those employed in the toolroom. The Board found that the production employee unit was appropriate under the circumstances of this case and, consequently, that a unit composed of the toolroom employees alone was not appropriate (R. 346–347, 350–351). Unless this determination is overturned, the closed-shop contract is invalid by reason of the unit which it covers.

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[21] Section 9 (b) provides as follows:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

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In attacking the Board's finding upon the appropriateness of the bargaining unit, petitioners must sustain a heavy burden. Section 9 (b) (*supra,* note 21, p. 43) and its legislative history show clearly that the Board is not subject, in making determinations of this nature, to any inflexible rule; delimitation of the appropriate unit is "obviously for determination in each individual case." [22] The Board exercises, in this regard, "a broad power of discretion" and its determination is final unless "clearly arbitrary upon the point" *National Labor Relations Board* v. *Lund,* 103 F. (2d) 815, 819 (C. C. A. 8).[23]

The Board's power in this respect is but another instance of the broad discretionary powers which are frequently vested in administrative agencies having an expert knowledge and specialized ex-

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[22] House Report No. 1147 (74th Cong., 1st Sess.), p. 22. It was there recognized that the question would "ordinarily arise as between two or more bona fide organizations competing to represent the employees."

[23] See also *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 477 (C. C. A. 5); *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 554 (C. C. A. 6); *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, decided July 23, 1940 (C. C. A. 8); *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 785 (C. C. A. 8); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 143 (C. C. A. 9), cert. denied, 304 U. S. 575; *National Motor Bearing Co.* v. *National Labor Relations Board*, 105 F. (2d) 652 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 789 (C. C. A. 9).

perience in the field of their operation. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485; *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270.[24]

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[24] Petitioners' statement that "The Railway Labor Act confers similar discretionary powers to prescribe units on the Railway Mediation Board" (Br., p. 27) is erroneous. The Railway Labor Act provides:

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act." 45 U. S. C. A., § 152 (4); 48 Stat. 1186.

Thus the Railway Labor Act makes mandatory the craft or class unit. The language quoted by petitioner (Br. 28) from *Brotherhood of Railway & Steamship Clerks* v. *Nashville, C. & St. L. Ry. Co.*, 94 F. (2d) 97 (C. C. A. 6), concerned the Railway Mediation Board's resultant lack of authority to determine bargaining units and is inapplicable under the National Labor Relations Act, which expressly vests in the Board power to determine whether "the employer unit, craft unit, plant unit, or subdivision thereof" is appropriate in the particular case (Section 9 (b)). However, the abuse of discretion test has been applied to the Railway Mediation Board's exercise of powers which are granted it; thus the courts have refused to disturb exercises of that Board's power to "designate who may participate in the election and establish the rules to govern the election" (45 U. S. C. A., § 152 (9); 48 Stat. 1186) absent the required showing of arbitrariness. *Association of C. E. of A. T. & S. F. Ry. System* v. *Brotherhood of Ry. and S. S. Clerks*, 85 F. (2d) 152, 157 (C. C. A. 7) *Brotherhood of Locomotive Firemen and Enginemen* v. *Kenan*, 87 F. (2d) 651, 654 (C. C. A. 5); *Brotherhood of Railway Trainmen* v. *National Mediation Board*, 88 F. (2d) 757, 761 (App. D. C.); *Nashville, C. & St. L. Ry.* v. *Ry. Employees' Dept.*, 93 F. (2d) 340, 342 (C. C. A. 6), certiorari denied, 303 U. S. 649.

In the present case, the U. A. W. contended that a unit composed of all the production employees, including the toolroom employees but excluding buffers and metal polishers, supervisory and office employees, was appropriate.[25] The I. A. M. contended that the toolroom employees constituted a separate appropriate unit (R. 350). If the Board was not required to set the toolroom employees apart, no question arises concerning the appropriateness of the unit found.[26]

Where conflicting requests for a plant unit and for a craft unit are advanced, a difficult question is presented for resolution by the Board. In some cases factors such as the history of collective bar-

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[25] The buffers and metal polishers have a closed-shop contract with the Company and all parties to the proceeding before the Board agreed that they should be excluded from the appropriate unit. Also no objection was made by any party to exclusion of supervisory and office employees, in accordance with the Board's normal practice. See *Third Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1939), pp. 180–185.

[26] Both the production and toolroom employees are eligible for membership in the I. A. M. as well as in the U. A. W., and both unions attempted to enroll the production and toolroom employees (R. 157–158). Some 20 of the 63 toolroom employees joined the U. A. W. (R. 173–175), thereby expressing their preference that the unit for collective bargaining be the plant rather than the craft unit. Eligibility for membership and the actual desires of employees as demonstrated by their free self-organization are both factors to which the Board normally and properly gives considerable weight in determining the propriety of the bargaining unit. *Third Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1939), pp. 163–167.

gaining in the plant, or similarity or dissimilarity in the objects of bargaining, may rather conclusively point to one unit or the other as better fitted "to insure to employees the full benefit of their right to self-organization and to collective bargaining * * *" (Section 9 (b), note 21, p. 43, *supra*).[27] Where factors such as these are evenly balanced, however, the Board has given determinative weight to the desires of the employees themselves, as evinced in their self-organization or as expressed in the polling booth. But here, too, a

[27] For a discussion of the various factors deemed relevant by the Board in considering the appropriateness of proposed bargaining units, see *Third Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1939), pp. 156–180. In the case at bar there had been no previous history of collective bargaining on either a craft or plant basis. The evidence showed that either basis was possibly appropriate. There is a close functional interdependence between the work done in the toolroom and that done in the production departments. The toolroom employees make and repair the tools and dies and repair the machinery used in the other departments (R. 75, 88, 135–136, 298, 350–351). It is not disputed that "primarily the toolroom is the beginning of production. Without the toolroom, without tools and dies there cannot be any production" (R. 88–89). The toolroom exists solely for purposes of the production departments; none of the tools and dies made are sold (R. 88). The toolroom is located in the center of the building housing all of the Company's employees; it is separated from the rest of the plant only by a wire fence having three gates, through which the toolroom employees are free to enter departments (R. 37–38, 89, 97, 129–130). The repair of machinery throughout the plant requires the toolroom employees to work in other departments (R. 27–28, 54). Maintenance workers also frequently come to the

further question has arisen: should the Board hold decisive the wishes of a majority of *all* the employees or the wishes of a majority of those who, it is contended, should be set aside from the others as a separate unit? Manifestly, neither majority can claim an unqualified right that their wishes be respected, to the exclusion of consideration of all other relevant circumstances (but compare Pet. Br., pp. 31–32). If the Board were required to give conclusive weight to the wishes of a minority in a proposed "employer unit" or "plant unit," the Board's power to determine appropriate units would in fact be vested in that minority.

To resolve conflicts between proposed craft and industrial units in the same plant, the Board propounded, in the exercise of its informed discretion, not as a matter required by the Act, the so-called Globe Doctrine, upon which petitioners rely.[28] See Cohen, *The "Appropriate Unit" under the National Labor Relations Act,* 39 Columbia Law Re-

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toolroom in order to use special equipment (R. 133). On occasion, production workers come to the toolroom to have their tools repaired (R. 78–83, 96). This factor of functional interdependence, indicating the presence of common questions in the bargaining of all the employees, is given substantial weight under the Board's settled policy. *Third Annual Report, supra,* pp. 191–192; see *Matter of Acklin Stamping Co.*, 2 N. L. R. B. 872, 877. While the toolroom employees are more skilled and are generally paid a higher rate of pay than the production workers, some of the latter are better paid (R. 8, 99, 138–139).

[28] The Globe Doctrine takes its name from *Matter of Globe Machine & Stamping Co.*, 3 N. L. R. B. 294, the case in which it was first evolved and applied by the Board.

view 1110, 1128. This doctrine is a simple one: where two conflicting units, a craft unit and an industrial unit, are proposed, resolution of the conflict will ordinarily depend upon the freely expressed desires of a majority of the employees in the less inclusive unit. In other words, when a majority of a defined craft have made a free choice, that choice will be preferred over that made by a majority of all the employees seeking collective bargaining.[29] If their choice is to set themselves apart, the craft unit is found to be appropriate; if they freely choose to be included within the larger unit, an industrial unit including them is found to be appropriate.

In the present case, however, there was no free expression of desire for a separate unit by a majority of the toolroom employees. Membership in the I. A. M.'s toolroom lodge could not be accepted as such an expression because it was ob-

[29] See *Third Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1939), pp. 167–174. The Board stated (at p. 167) that the desire of the employees "has been given cardinal significance in cases where rival organizations have advanced different contentions as to the form of organization which should govern among a particular company's employees, and the circumstances of the case have been such that if either contention had been unopposed it would have been adopted. This situation has involved most commonly a dispute between one or more unions advocating organization along plant-wide lines, and one or more unions advocating organization along plant craft lines. In such situations, the Board has established the practice of considering the wishes of a majority of the employees in the craft group as to their inclusion in a plant-wide unit."

tained through the assistance of employer interference and coercion which destroyed freedom of choice among the toolroom employees (*supra,* pp. 13–26). The Board therefore found that the Globe Doctrine was not applicable (R. 351).[30] Absent the basis for the Globe doctrine, the Board found appropriate the more inclusive unit proposed by the U. A. W. (R. 350–351). The present case, therefore, represents no departure from the Globe doctrine. See Cohen, loc. cit., *supra,* p. 48.

The exact purport of petitioners' contention that it was arbitrary for the Board not to set the toolroom employees apart is not clear. Petitioners claim that the Board concedes the appropriateness of a unit composed only of the toolroom employees but maintains that employer interference "renders the unit inappropriate" (Br. pp. 11, 29, 30, 32–35). Neither the Board's findings nor our argument in the court below or here will stand this interpretation. Admittedly, the toolroom employees constitute a craft, as they ordinarily do; they would ordinarily, therefore, comprise an appropriate unit if a majority of them decided, without interference or coercion, that they wished to bargain separately.

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[30] The Board's finding reads as follows (R. 351):

"While ordinarily we have regarded as controlling the free choice of a majority of the employees in a well defined craft as to the form of organization they desire, in the present case the [Company's] conduct in influencing such choice precludes the application of this doctrine in the determination of the appropriate unit or units."

But this is not to say that they would have necessarily made up an appropriate unit had there been no interference by the Company; such an assertion is necessarily based upon an assumption that the choice which the employer compelled the men to make would have been made had he not interfered. No such assumption can be made.

Similarly, petitioners err in stating that "the Board has found in all other cases that these factors (training, skill, aptitude, mutuality of interests and historical development) combine to make tool and die workers appropriate craft units" (Pet. Br., pp. 11, 30–31, 32). The Board has considered these factors in determining that tool and die makers constitute a craft, that is, a well-defined group sufficiently separate in employee interest from other employees to make them a *possible* appropriate collective bargaining unit. But the Board's finding as to whether such craft is an appropriate collective bargaining unit has basically rested upon the freely expressed desire of a majority in the craft for or against a separate unit. Indeed, in the type of case to which petitioners refer, an election has preceded determination of the appropriate unit. In directing the election, the Board finds that either the craft unit or the industrial unit may be appropriate, depending upon the desires of a majority of the craft. The factors mentioned by petitioners do not serve, without more, to establish the appropriateness of the unit

claimed.[31] In other words, under the Globe Doctrine the existence of a well-defined craft is not a basis alone for holding the craft unit appropriate; the operative fact is the free desire of a majority of the craftsmen for a craft unit.

But, petitioners argue, assuming that membership in the I. A. M. was coerced and afforded no basis for a finding that the toolroom employees constituted an appropriate unit, the Board should have directed an election to be held after the effects of the unfair labor practices were dissipated, and thereby determined the desires of a majority of the toolroom employees (Br., pp. 34–35). The short answer lies in the fact that this was not a representation proceeding under Section 9 but an unfair labor practice case under Section 10. The Board had before it for determination the issue whether the Company had violated Section 8 (5) of the Act by refusing to bargain with the U. A. W. as the exclusive representative of all the production employees, including the toolroom employees. This involved a determination whether the U. A. W. represented a majority of the employees in an appropriate unit at the time of the refusal to bargain. At that time there was no uncoerced choice by a majority of the craft to set themselves

[31] For cases in which a so-called "Globe election" was held upon conflicting claims of craft and industrial units see *Fourth Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1940), pp. 86–87; *Third Annual Report of the National Labor Relations Board* (Govt. Print. Off., 1939), pp. 167–174.

apart from the industrial unit. Nor could the Board undertake to determine whether such a choice would have been made had no assistance been rendered to the I. A. M. by the Company. An election in 1938 could not demonstrate what unit was appropriate in 1937, even were it possible to hold a free election before compliance by the employer with an order remedying the unfair labor practices (see pp. 66–70, *infra*).

In other words, petitioners contend that even if there was no free desire by a majority of the toolroom employees for a craft unit, petitioners' organizational campaign with employer assistance prevented inclusion of the toolroom employees in *any* unit during 1937 and deprived the Board of power to determine whether the Company violated Section 8 (5) by refusing to bargain with the U. A. W. as the representative of a majority in a unit including those employees. This contention is plainly unsound. Unless a majority of the craft employees have freely elected to disassociate themselves from the other employees, there is no reason for the Board to deny effect to the free choice of a plant unit by a majority of all the employees, as evidenced by the U. A. W.'s conceded majority in this case. A substantial number of the toolroom employees were included in this majority (note 26, p. 46, *supra*). Nor may petitioners contend that all the employees should have been deprived of their right to bargain collectively simply because peti-

tioners were introduced into the plant with the employer's assistance and obtained a coerced membership among a craft. The Board's determination that the unit for which the U. A. W. sought to bargain was an appropriate unit was entirely reasonable in the absence of a free desire to the contrary on the part of a majority of the craft, entertained at the time of the refusal to bargain.[32]

In the last analysis, petitioners' position is that labor organizations claiming to represent crafts have an absolute right to have the units they favor approved as appropriate by the Board, regardless of whether or not the representation they claim has resulted from unfair labor practices. Thus, petitioners construe the Board's finding that the unit freely desired by a majority of all the employees in this case is appropriate, as "punitive" against the craft union and as operating "to destroy a craft unit" (Pet. Br., 34–36). Aside from the fact that the Act does not require the appropriateness of proposed craft units at all, much less under any and all circumstances, no one may demand recognition of a status obtained through a denial of rights guaranteed by public statute. *National Licorice*

[32] Petitioners' assertion that the Board must give conclusive weight even to a coerced choice by a craft majority lest the employer, by gratuitous favor to unwilling unions, be enabled to render an otherwise appropriate unit inappropriate (Br., pp. 32–35), surely is not pertinent upon the facts of this case. The Board is equipped to uncover such attempts, and has discretion under the Act appropriately to deal with them.

Co. v. *National Labor Relations Board,* 309 U. S. 350, 364–366. Further, the claim disregards the availability of the representation proceedings provided by section 9 of the Act, whereby a ready means is afforded for the determination of bargaining units and representatives freely desired by the employees (*infra,* pp. 74–76). The Board's order in this case, and the practice of the Board, leave open the way for future representation of the employees by the I. A. M., the U. A. W., or any other labor organization freely designated by a majority in any unit which may hereafter be found appropriate.[33] Petitioners' assertion that this is no

[33] The Board's order requiring the Company to cease giving effect to the closed-shop contract with the I. A. M. expressly provides that "nothing in this order shall preclude the respondent from hereafter making an agreement with the International Association of Machinists, or any other organization (not established, maintained, or assisted by any action defined in the National Labor Relations Act as an unfair labor practice) requiring as a condition of employment, membership therein, if such labor organization is the representative of the employees in an appropriate bargaining unit as provided in Section 9 (a) of said Act" (R. 363).

The Board's decisions likewise make it clear that at a later date the I. A. M. may come in and have its claim for a craft unit considered on the basis of the facts then existing; the Board's order in the present case will not bar a determination that a different unit is then appropriate. In *Matter of Pacific Greyhound Lines,* 9 N. L. R. B. 557, 573–574, the Board, speaking in respect to the effect to be given the results of a Globe election in a subsequent case said: "We find nothing in the Act which requires or supports the application of a principle analogous to that of the judicial doctrine of *res judicata* in matters involving a determination of the appropriate unit for collective bargaining purposes. Sec-

protection because of the Board's practice that "designation of a unit and certification of a representative therein" is binding for one year (Br., 35–36) ignores the fact that more than two years have elapsed since the Board issued its order and the Company complied with it. Further, the Board has never determined whether it will apply the one-year rule to an order remedying unfair labor practices under Section 10 (c), as distinguished from a certification of representatives pursuant to Section 9 (c).

In addition to the inapplicability of the Globe Doctrine as a basis for carving the toolroom employees out of the more inclusive unit, a majority of the Board found that since the I. A. M. was attempting to enroll all of the production employees, including the toolmen, on a plant unit basis, it could not be heard to maintain that the craft unit was appropriate (R. 351).[34] The record

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tion 9 (b) of the Act empowers the Board to 'decide in each case' the appropriate unit and its guide in so doing, as therein stated, is 'to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act.' A prior decision in regard to whether a certain unit of employees is appropriate for purposes of collective bargaining is a circumstance, but not a decisive one, which the Board in the exercise of a sound discretion will consider should such question again present itself in a subsequent proceeding involving the representation of such employees."

[34] The third member of the Board, Chairman Madden, believed that this point was unnecessary for decision of the case and that no opinion should be expressed concerning it (R. 366).

shows that as early as August 10, prior to execution of the closed-shop contract on August 11 (*cf.*, Pet. Br., 37), the I. A. M. extended its organizational campaign from the toolroom employees to all the production employees (R. 156–157). Supporting the Board's finding that the creation of two I. A. M. locals, one for the toolroom employees and the other for the remainder of the production employees, "must be deemed artificial" (R. 351), is the fact that the membership cards signed by the employees designated the I. A. M., not the respective locals, to act as the bargaining representative (fol. 637; see R. 11). In the proceedings before the Board it was the I. A. M., not the respective locals, which claimed representation of the employees (R. 11–15, 327). MacDonald, an official of the Grand Lodge, not of either local, was the chief negotiator for the union in the bargaining between the I. A. M. and the Company (R. 343, 345). He took the leading part in obtaining the closed-shop contract covering the toolroom and signed it for the I. A. M., along with officials of the toolroom local (R. 10, 343, 345). He also conducted the bargaining concerning the production employees (Fol. 183–184, 318–320; Tr. 1528–1532). MacDonald, who represented the I. A. M. at the hearing before the trial examiner, there stated that if the more inclusive unit were held appropriate, the I. A. M. would bargain on behalf of all employees in that unit (R. 158–159).

This circumstance cast further doubt upon the validity of the assertion that, by enrolling in the I. A. M., the toolroom employees expressed a desire for the craft unit. Even had such membership been freely obtained, which it was not (*supra,* pp. 13–26, 42), the desire indicated was at least equivocal.[34a] And it was plainly proper for the Board to give weight, as it did (R. 351), to the free and unequivocal choice of the plant unit indicated by a substantial number of the toolroom employees in joining the U. A. W. (note 26, p. 46, *supra*). There was no history of collective bargaining by the craft; the toolroom employees had not theretofore organized themselves on the basis of a craft unit; and the I. A. M. was not organizing in such a way as to engage in craft bargaining. On the contrary, the I. A. M., along with the U. A. W., tacitly recognized the desirability of enrolling all of the employ-

[34a] An employee who joined the I. A. M. of his own free will—assuming that that was possible despite the Company's unfair labor practices—must have understood from the I. A. M.'s plant-wide campaign, that if that organization achieved recognition, it would, in collective bargaining with the Company, have the united force of all the production employees, including the toolroom employees, behind it. This is the primary consideration motivating choice by employees of the plant unit over the craft unit; labor organizations representing plant units frequently advance separate terms on behalf of particular classifications of workers, but this is not regarded as bargaining on behalf of a craft unit. The test, at least in the view of the employee, is whether all the employees or only the members of the craft stand behind the bargaining representative.

ees, including the toolroom employees, in order to achieve bargaining strength.

Petitioners assert (Br. 37–39) that it is the uniform practice of the I. A. M. to segregate employees such as the toolroom employees from production employees and to organize them into separate locals. But organization of separate locals is beside the point where the bargaining is jointly done for a composite unit. See note 34a, p. 57, *supra*. The I. A. M. has consistently sought to broaden the base of its jurisdiction. It has repeatedly advocated amalgamation of all metal trade labor organizations so as to strengthen, by broadening, the bargaining unit, has, in practice, joined with other such unions in bargaining on behalf of a broader unit, without the formality of amalgamation, and has frequently entered into contracts with employers covering tool and die workers along with production and other employees.[35]

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[35] A. O. Wharton (President of I. A. M.), *Fifty Years of the Machinists Union*, in Labor Information Bulletin, U. S. Bureau of Labor Statistics, Vol. V, No. 5 (May 1938); *Proceedings of the 14th Convention of the International Association of Machinists* (1911), pp. 80, 137; *Proceedings of the 15th Convention, etc.* (1916), p. 83; *Proceedings of the 16th Convention, etc.* (1920), pp. 182–1901; *Proceedings of the 19th Convention, etc.* (1936), pp. 54–64, 162–164, 251, 278; Paragraph 7 of the I. A. M.'s constitution, 1911, see *Proceedings of the 14th Convention, supra*, pp. 13–14; *Machinists Monthly Journal* (official organ of I. A. M.) September 1937, p. 603 (Lockheed Aircraft contract); *ibid.*, December 1937, p. 829 (Continental Can contract); *ibid.*, October 1937, p. 672 (Portland Cement contract); *ibid.*,

In the present case, the I. A. M. plainly did not consider arbitrary a single unit which would permit all of the production employees to bargain through a single representative. That view was first advanced after the Board determined that the U. A. W., not the I. A. M., was the authorized representative in the plant unit. The source of peti-

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September 1938, p. 681 (Ralph N. Brodie contract); *ibid.*, September 1938, pp. 733–734 (contracts in general).

Relevant to the question of the I. A. M.'s claimed adherence to craft unionism, as well as to petitioners' claim that in the present case the Board has been guilty of "outrageous interference with [the] internal affairs" of the I. A. M. (Br., 38–39), are the conflicting claims made before the Board in *Matter of Standard Forgings Corp.*, 26 N. L. R. B., No. 122, decided August 28, 1940. In that case petitions for certification were filed by a C. I. O. union and by the I. A. M. The I. A. M. contended that the appropriate unit should consist of "all production and maintenance employees employed in the departments known as the general machine shop, small machine shop, die turning department, die sinking department, sheet metal department, axle cutting department, axle turning department, and axle shed." Chicago Die Sinkers Local No. 1512 of the I. A. M. intervened and, in contravention of the claim advanced by its parent organization, contended that the die sinkers should be set apart as a separate appropriate unit. The I. A. M. opposed the Local's request for certification as representative of the die sinkers. The Board pointed out that its regular practice was to dismiss "proceedings wherein two unions subject to discipline by the same parent body have disagreed over the extent of their jurisdiction." In this case, although both the I. A. M. and Local No. 1512 were both affiliated with the same parent body (the A. F. of L.), the Board held that since the Local was chartered by and subordinate to the I. A. M., the I. A. M.'s opposition was conclusive upon the Local's claim.

tioners' complaint is not the breadth of the unit, but the identity of the representative.

Since the I. A. M. had been assisted by the Company's unfair labor practices, since the I. A. M. was not the freely designated representative of a majority of the toolroom employees, and since those employees did not constitute an appropriate bargaining unit, the closed-shop contract between the Company and the I. A. M. failed to satisfy any one of the three conditions imposed by the proviso to Section 8 (3) (pp. 12–13, *supra*). The contract was plainly invalid under the express terms of the Act.

E

THE ORDER REQUIRING THE COMPANY TO CEASE GIVING EFFECT TO ITS CLOSED-SHOP CONTRACT WITH THE I. A. M. IS VALID

The Board ordered the Company to cease and desist from giving effect to its closed-shop contract with the I. A. M. (R. 363). Continued operation of the contract would cause the Company to discriminate against employees in violation of the Board's order and of the Act. Since the contract is illegal, the order requiring the Company to cease enforcing it is plainly valid as an exercise of the Board's mandatory power to enjoin unfair labor practices, as well as of its affirmative power to effectuate the Act's policies by removing improper restraints upon the employees' exercise of their

rights. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236; *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 660 (C. C. A. 9).

II

THE ORDER REQUIRING THE COMPANY TO BARGAIN COLLECTIVELY WITH THE U. A. W. AS THE EXCLUSIVE REPRESENTATIVE OF THE PRODUCTION EMPLOYEES IS VALID

Petitioners attack the order requiring the Company to cease and desist from refusing to bargain collectively with the U. A. W. (R. 363), and the notices provision (R. 365) insofar as it requires a statement that the Company will bargain with the U. A. W. (Pet. Br. 41–53). Petitioners do not deny that these provisions constitute the normally proper remedy for a refusal to bargain, as this Court and the Circuit Courts of Appeals have held. Instead, the basis of challenge in the instant case is that the Board was bound to withhold the normal remedy because petitioners filed with the Board, four days before issuance of its order, an affidavit and letter claiming that the I. A. M., not the U. A. W., then represented a majority of the production employees (R. 11–15).[36] The argument is

[36] The letter (R. 12) and petitioners' brief (p. 42) rely in part upon an asserted agreement for an election entered into between the Company and the U. A. W. in settlement of a suit in a state court to enjoin strike activities by the U. A. W.

that, while the U. A. W. was concededly the authorized representative of the employees at the time of the refusal to bargain (R. 352, 407–408) and while petitioners made no showing at the hearing of any majority shift in the period following the refusal to bargain, the bargaining order was nevertheless rendered improper by the assertion, on the eve of the Board's decision, that the U. A. W. had been replaced as the accredited representative. The court below rejected this contention, stating (R. 374–375):

> Notice of the I. A. M.'s claim of subsequent change was not given to the Board until four days prior to its decision. No effort was made, pursuant to Section 10 (e), to apply to a court for leave to adduce additional evidence. In addition to failure to

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(R. 12). The agreement, to which the I. A. M. was not a party, provided that the employees should return to work and the strike be "suspended pending an election to be held at such time and place as the Labor Relations Board may determine" (R. 164–165). But thereafter, at the hearing before the trial examiner, it was stipulated that the U. A. W. had been designated by a majority of the employees (R. 175–176), rendering the election unnecessary, as the Board found (R. 357, note). The other consent election agreements in evidence (R. 165–168) were not completely executed because of disagreement concerning the appropriate unit and other matters (R. 356–358). The parties understood that if the record established majority representation by one of the unions in an appropriate unit, no election would be necessary (R. 78, 83). Petitioners' present contention that an election should have been held must rest solely upon its assertion, after the hearing, that a shift of majority had occurred, not upon any agreement of the parties.

exhaust this judicial remedy, two considerations support the Board's refusal to call an election in the present circumstances. First, there is nothing to indicate that the unfair practices, which the Board and (as will appear) we have found existed, were remedied until after the order was entered. Therefore, any shift in majority affiliation between the hearing and the decision, had it occurred, presumably must have been affected or effected by them. Furthermore, the case is not one in which the majority at the time of the hearing was doubtful or improperly constituted, as by the employer's aid or inclusion of ineligible members. Whatever may be the rule when such defects exist, in their absence the presumption arises that the freely established majority continues until the Board has an opportunity to make its decision. In its discretion it may hear additional evidence as to the majority's continued existence. But these presumptions, when sustained by the facts, should prevent its refusal to do so from being arbitrary, as against mere *ex parte* and self-serving assertions that a shift has occurred. Any other rule would make a merry-go-round of the Act, since like representations could be made in turn following each new one by the contending unions in order to prevent or delay a decision contrary to their interests, with no other result than to maintain the proceeding in a state of indefinite suspension and indecision. This view does no more than afford the

> Board a reasonable opportunity to perform its functions under the Act. It does not deprive employees of the power to select their representatives by choice of the majority. If conditions have changed and a majority now wish to join a local I. A. M., they may do so and call for an election.

The Board's position concerning asserted changes in majority representation following the commission of unfair labor practices was fully argued to the Court in *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318.[37] The Court enforced the order requiring collective bargaining, stating (p. 340):

> In view of the substantial support in the evidence for the Board's findings that the company intimidated and coerced its employees and dominated the Federation, the Board properly concluded that "The unfair labor practices of the respondent cannot operate to change the bargaining representative previously selected by the untrammeled will of the majority."* And, accordingly, the Board was justified in its finding "that on April 4, 1937, and at all times thereafter, the T. W. O. C., pursuant to Section 9 (a) of the Act, was the exclusive representative of all the employees in the appro-

[37] Brief for the National Labor Relations Board, No. 588, last Term, pp. 35–60; Reply Brief for the National Labor Relations Board, pp. 14–17.

priate unit for purposes of collective bargaining. * * *

*Cf. Texas & N. O. R. Co. *v.* Ry. Clerks, 281 U. S. 548, 557, 571, affirming 33 F. (2d) 13, affirming 24 F. (2d) 426; 25 id. 873; 25 id. 876, 877–8. [Footnote by the Court.]

The principle that a labor organization freely chosen by a majority of the employees as their bargaining representative is presumed to retain that status until the employees reject it of their own volition, discounting the effects of employer coercion, was established prior to the Act by the decision in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, affirming 33 F. (2d) 13 (C. C. A. 5), affirming 24 F. (2d) 426, 25 F. (2d) 873, 876.[38] The view that, despite apparent or "surface" repudiation of a majority representative induced by illegal employer action, the representative is presumed to retain such status until the employees freely select another representative or choose not to be represented, was adopted by the first National Labor Relations Board, with express reference to the remedial action sanctioned in the *Railway Clerks* case. *Matter of North Carolina Granite Corporation,* 1 (old) N. L. R. B. 89; *cf. Matter of Danbury & Bethel Fur Company,* 1 (old) N. L. R. B. 195. See also *Matter of Lyon Oil Refining Company,* Decisions of the Petroleum Labor Policy Board, p. 34. As this Court has recognized (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines,*

[38] See Brief for the National Labor Relations Board, No. 588, last Term, pp. 43–45.

Inc., 303 U. S. 261, 267), and as the legislative history clearly shows,[39] Congress, in enacting the present statute, relied upon the *Railway Clerks* decision and upon the principles stemming from that decision which had been adopted by administrative tribunals created to deal with labor problems.

Two main considerations constitute the foundation of this principle in a case such as the present one. Requiring an employer to recognize and negotiate with the representative with whom it has illegally refused to bargain is necessary, first, in order to dissipate the coercive effects of the unfair labor practices by restoring the right denied the employees and thus to effectuate the Act's fundamental purpose of insuring collective bargaining under free conditions; and, second, in order that the collective bargaining provisions of the Act shall not be rendered unworkable and unenforceable. We shall discuss these grounds separately.

1. Employees join labor organizations, and otherwise designate representatives, to secure collective bargaining. Accordingly, whether or not the employer recognizes and bargains with the agency selected by the employees is a decisive factor affecting the ability of that representative to secure or retain its constituents. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,*

[39] Report of House Committee on Labor (H. Rept. No. 1147, 74th Cong., 1st Sess.), pp. 3–7, 15–18, 22, 24); Report of Senate Committee on Education and Labor (S. Rept. No. 573, 74th Cong., 1st Sess.), pp. 2, 9, 13, 16, 17.

Inc., 303 U. S. 261, 271; *cf. Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 568–569. Indeed, the natural and intended effect of a refusal to recognize and bargain with the employees' representative—to preclude the exercise of its principal and essential function—is to divert the employees to a second choice or to persuade them to abandon completely their collective bargaining objective by emphasizing the futility of any representation. An unlawful refusal to bargain with a freely chosen representative, like the illegal recognition of an employer-dominated organization for bargaining purposes, constitutes a "continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing." *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275. For this reason, so long as a refusal to bargain lacks effective remedy and obstacle to free choice which it has created continues; hence any asserted shift away from the freely chosen representative cannot be regarded as the uninfluenced and voluntary action of the employees. The shift might not, and normally would not, have occurred if the representative first chosen had been recognized, as required by the Act. Since the Act proceeds upon the premise that conduct which it prohibits does interfere with freedom of choice, certainly any asserted change, or doubt upon the matter, must be held to be immaterial and be disregarded in order

to give full effect to the policy of the Act to promote and insure only free selections. *Cf. National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241.

This objective cannot be attained merely by restraining unfair labor practices through the cease and desist provisions. The refusal to bargain must be undone by restoring the representative freely chosen by the employees to the position which they conferred upon it but which the employer wrongfully withheld. The order, if it is to effectuate the policies of the Act, must do so by "eradicating" all the effects of the unfair labor practices, "as from the beginning." *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 151 (C. C. A. 5). This can be accomplished only by including in the order a remedy adequate to relieve the coercive effects of the refusal to bargain; that remedy is enforcement of the obligation to negotiate.

In the present case this conclusion is further strengthened by the fact that the employer's unfair labor practices consisted not only of a refusal to bargain, which would have the natural effect of leading the employees away from the U. A. W., but of further illegal acts against the U. A. W. and in favor of the I. A. M. (*supra*, pp. 13–26) which were designed to place the majority precisely where petitioners now claim that it rests. In this respect, petitioners' claim is analogous to that advanced by the employer in the *Bradford Dyeing* case, that the majority vested in the com-

pany union as a result of the unfair labor practices, constituted a bar to enforcement of the order to bargain with the T. W. O. C. Precisely applicable here is the conclusion in that case (*supra*, p. 64), that the employer's unfair labor practices could not serve to change the representative freely selected by the employees.[39a]

The decisions in *National Labor Relations Board* v. *National Licorice Co.*, 104 F. (2d) 655 (C. C. A. 2) and *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8), upon which petitioners rely (Br. 43–46), as well as the decision in *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2), give no weight to the important consideration that refusals to bargain and other illegal invasions of the employees' rights to organize and bargain collectively, do have the natural result of dissipating union majorities and of casting serious doubts upon the free nature of subsequent majorities claimed prior to remedying of the unfair labor practices. In conditioning enforcement of the bargaining order upon proof of representation at the time of review, those decisions must assume that an unremedied refusal on the part of an employer to recognize the repre-

[39a] The size of the U. A. W.'s conceded majority representation of the production employees, including 20 of the 63 toolroom employees (note 26, p. 46, *supra*) raises a strong presumption that it would have continued as the freely chosen representative had not freedom of choice been destroyed.

sentative which the employees freely selected is irrelevant to that agency's continued free designation, and will not influence the employees' decision whether or not to designate that representative again in an election held prior to remedying of the unfair labor practices. We submit that a failure to enforce the bargaining order leaves the employees subject to impediments to a free choice equal in force, and at least equivalent in character, to those left in operation by the temporary disestablishment ordered by the Circuit Court of Appeals in *National Labor Relations Board* v. *Falk Corp.,* 106 F. (2d) 454 (C. C. A. 7), and disapproved by this Court, 308 U. S. 453. If a choice of representatives, freely made, is permitted to go unprotected by the agencies of government charged with safeguarding that choice, the employees who made it cannot be expected to venture that selection again.

In short, if the Board's "judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular relief to be ordered" (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265) is to be overruled upon the single basis that the chosen representative's majority status may have been lost after the refusal to bargain, full scope will be given to the unfair labor practices in achieving their intended result and the development of genuine collective bargaining will

be substantially hindered. We submit that the Act does not allow an interpretation yielding results so inconsistent with its purposes. If they were to be avoided in this case, the Company's refusal to bargain with the U. A. W. had to be remedied by an order requiring such bargaining before the I. A. M. could claim authority to act as the employees' representative.

2. The decisions modifying the Board's bargaining orders prevent effective and orderly administration of Section 8 (5). Congress intended that this section should be enforced, and in a workable way. Yet, if asserted changes in representation, alleged to have occurred subsequent to a refusal to bargain with a majority representative, are a barrier to remedying the unfair labor practices by an order compelling obedience to the statutory obligation, Section 8 (5) is rendered sterile. If one such claim must be inquired into, successive ones must be, with the result that the Board, as well as the reviewing courts, could never reach a decision.[40]

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[40] In *National Labor Relations Board* v. *The Boss Manufacturing Co.*, 107 F. (2d) 574 (C. C. A. 7), the Board rendered an order, in August 1937, based upon a prior refusal to bargain. The order required the company to bargain with the union illegally denied recognition. In October 1937 the Board filed a petition for enforcement. In January 1938 the court granted a motion by the company to adduce additional evidence, in which motion it was asserted, *inter alia*, that the proof of majority was too old to support the bargaining order. Upon further hearing before the Board it appeared that membership in the union had increased since the refusal to bargain. The Board filed its supplemental findings with

That is the necessary result of the position of the court in the *Hamilton-Brown* case.

The modification ordered by the Circuit Court of Appeals in the *National Licorice* and *American Manufacturing* decisions, which was not before this Court on review, is even more clearly erroneous; in those cases, without any evidence tending to establish a change, but solely upon doubts raised *sua sponte* and based in part on lapse of time, the reviewing court declined to enforce the bargaining order as issued. Lapse of time is inevitable, through no fault of the employees, their representative, or the Board. It is a concomitant of all administrative or judicial proceedings. Certainly the procedure Congress prescribed for enforcement of the Act cannot be utilized as a basis for not enforcing it. If changes in representation thought to have occurred after a refusal to bargain are relevant at all, which we submit they are not (*supra,* pp. 64–70), clearly only changes occurring prior to the Board's order and reflected in the record made at the hearing before the Board should be considered. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230; *National*

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the court and again requested enforcement of its order. When the case came on to be heard in June 1939 the company insisted that proof of the union's then majority status was an essential prerequisite to enforcement of the bargaining order. The court enforced the provision in question without expressly ruling upon this objection.

Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250. *Cf. National Labor Relations Board* v. *Fansteel Metallurgical Co.*, 306 U. S. 240, 261–262.

Petitioners attack the view of the court below that acceptance of their contention "would make a merry-go-round of the Act" (R. 375) on the ground that the Board can withhold a bargaining order but dissipate the effects of the unfair labor practices in other respects and then hold an election (Br. 46–48). Noticeably absent is any suggestion as to how the coercive effects of a refusal to bargain with a chosen representative can be dissipated without a requirement that the rights illegally denied be granted (*supra*, pp. 66–70). The argument, in essence, is similar to that advanced on behalf of the employer in the *Falk* case. There the effort was to convert an unfair labor practice proceeding designed to halt and remedy the employer's maintenance of a company union into a representation proceeding designed to determine whether the company union would be selected as the employees' representative even if the employer's sponsorship was withdrawn. Here the effort is to convert an unfair labor practice proceeding designed to halt and remedy an illegal refusal to bargain with a representative whose authority is conceded, into a proceeding for certification of representatives. Both efforts, if successful, have the necessary consequence of permitting unfair labor practices further to defer all collective bar-

gaining, in addition to allowing them full scope in influencing a selection which must be that of the workers alone. Unless the determinative issue in a proceeding under Section 10 is whether the charging union was the duly authorized representative at the time of the refusal to bargain, such proceedings are entirely futile, and may as well be dispensed with in favor of representation proceedings under Section 9 designed to select a representative, whether or not freedom of choice is assured. And if petitioners reply that it is the bargaining order, not the fact of violation, to which subsequent shifts of majority are relevant, the rejoinder is that proceedings under Section 10 based upon refusals to bargain are entirely futile if the Board, while free to find a violation, is powerless to order an effective remedy.

Petitioners contend that the order fastens upon the employees a representative which they possibly may no longer desire, independently of the effects of the unfair labor practices. But "until the Board's order has been faithfully carried out" the employees' real desires "are matters of speculation and argument." *National Labor Relations Board* v. *Brown Paper Mill Co.,* 108 F. (2d) 867, 872 (C. C. A. 5). Nor may it be said that the order deprives the employees of power to change their representative, and thus has the necessary, if not the intended, effect of frustrating petitioners' efforts to be designated as the representative.

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The order does not assure to the U. A. W. a permanent status, or status for any fixed period of time. Section 9 of the Act provides adequate machinery for resolving questions of representation after genuine freedom of selection is restored by removing the impediments the employer has erected. The union attaining its claimed representation after unfair labor practices have destroyed freedom of choice need only wait until this condition has been corrected by compliance with the order; it is then free to petition the Board under Section 9 for investigation of the question concerning representation. In the present case the Company has long since complied with the Board's order; petitioners have therefore long been free to obviate the prejudice they now assert by filing such a petition. Instead, they have continued to rely upon the request for an election made by them before the Board had made any order and when the unfair labor practices were in full effect, and have continued to insist that the election must be conducted as part of an unfair labor practice case, where it has no proper place.

The bargaining order cannot be said to foist an unwanted representative upon the employees, or to preclude recognition of any union seeking to achieve representation, when the employees, or any labor organization on their behalf, may raise

anew the issue of representation.[41] The question here is whether that issue must be determined, as petitioners contend, in circumstances which do not assure full freedom of choice. We submit that to anticipate the question of change without, and in advance of, according recognition to a selection voluntarily made, is to proceed under conditions which leave the employees subject to improper restraints. Obtaining collective bargaining should not require the employees to pay such a price. The essence of petitioners' claim is that they had an absolute right to force the issue at a time when the scales were weighted in their favor. Denial of such a right, they claim, was arbitrary on the part of the Board.

The Board's position that asserted shifts of majority following refusals to bargain or other interference cannot be viewed apart from the unfair labor practices and cannot serve to preclude the normal relief for a violation of Section 8 (5),

[41] The remedy deemed appropriate in the *Railway Clerks* case was reinstatement of the last freely chosen representative to the position of bargaining agency "until such time as these employees by a secret ballot taken in accordance with the further direction of the Court, and without the dictation or interference of the Railroad Company and its officers, should choose other representatives" (281 U. S., at 557). This remedy, devised by a court of equity to restore the status disrupted by interference with freedom of choice, is even more appropriate under the National Labor Relations Act since Section 9 is expressly designed to determine a change in representation and readily permits effective expression of a change.

has been approved by the Circuit Courts of Appeals for the First, Fourth, Seventh, Eighth, and Tenth Circuits in well-reasoned opinions. *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 690–691 (C. C. A. 1); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 640 (C. C. A. 4); *M. H. Ritzwoller* v. *National Labor Relations Board*, decided May 8, 1940 (C. C. A. 7);[42] *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 788 (C. C. A. 8); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 481 (C. C. A. 10). See, also, *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869–870 (C. C. A. 2), cert. denied, 304 U. S. 576; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6), cert. denied, 308 U. S. 568; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 198, 98 F. (2d) 18 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 790 (C. C. A. 9). We submit that the construction of the Act thus approved is a reasonable one and that its acceptance is necessary if the right to collective bargaining conferred by the Act is not to become illusory.

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[42] But *cf. Stewart Die Casting Corp.* v. *National Labor Relations Board*, decided July 3, 1940 (C. C. A. 7).

CONCLUSION

We respectfully submit that the provisions of the Board's order challenged by petitioners are valid and that the decree below should be affirmed.

FRANCIS BIDDLE,
Solicitor General.
CHARLES FAHY,
Assistant Solicitor General.
THOMAS E. HARRIS,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
Associate General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel,
MORTIMER B. WOLF,
RUTH WEYAND,
Attorneys,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are as follows:

> SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SECTION 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a),

in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. * * *

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